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Medical Marijuana with a Dash of Nutmeg: Our New World of "No Knowns"

Dwight H. Merriam

Former Secretary of Defense Donald Rumsfeld made an observation that seems so apt in this New World of legalized medical marijuana here in Connecticut:

> The message is that there are no "knowns." There are things we know that we know. There are known unknowns. That is to say there are thing [sic] that we now know we don't know. But there are also unknown unknowns. There are things we don't know we don't know. So when we do the best we can and we pull all this information together, and we then say well that's basically what we see as the situation, that is really only the known knowns and the known unknowns. And each year, we discover a few more of those unknown unknowns.[1]

The General Assembly enacted Public Act 12-55,[2] An Act Concerning the Palliative Use of Marijuana, and Governor Malloy signed it into law on May 31, 2012, decriminalizing and setting up a system for growing, prescribing, dispensing, and possessing marijuana for medical use. The Nutmeg State joined 16 others (Alaska, Arizona, California, Colorado, Delaware, Hawaii, Maine, Michigan, Montana, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington) and the District of Columbia in allowing such use. A year earlier, the Connecticut General Assembly decriminalized the possession of small amounts of [marijuana], cannibas sativa L. or Δ^9-tetrahydrocannabinol, abbreviated as THC.[3]

The problem is that the legalization of medical marijuana carries with it many "known unknowns" and doubtless some "unknown unknowns." Chief among the known unknowns, and the focus of this article, are how will federal enforcement of federal law affect Connecticut's efforts to make this drug available, and how the state and its municipalities will reconcile many of the inherent conflicts.

What We Do Know

Let us start with a "known known"—what the new law does. It is much improved over the prior proposal and is at the most progressive, cutting edge of such legislation, overcoming many of the problems experienced in other states. The General Assembly obviously learned from the mistakes of others.

The law creates a highly-centralized, top-down system with some clear limits and an expansive oversight role for the Department of Consumer Protection. The Department of Consumer Protection will:

- license producers—at least three and not more than ten—to grow marijuana in secure, indoor facilities,
- define medical conditions in addition to those enumerated in the Public Act for which marijuana may be prescribed with the guidance of an eight-member Board of Physicians,
- license dispensaries which may only be licensed pharmacies,
- determine the number of dispensaries statewide, and
- register qualifying patients.

Ganja's Long and Proud History

Marijuana, the hemp plant, was cultivated and woven into fabric around 7000-8000 BCE, and used as food in China about 600 BCE. By 2727 BCE, its use as a medicine is documented in China, where the plant was cultivated on a large scale for food and fiber.[4] Emperor Shen Neng of China prescribed marijuana tea for the treatment of gout, rheumatism, malaria, and poor memory.[5] Blame our problems on Christopher Columbus, who reportedly brought plants to the New World in 1492.[6] Thomas Jefferson grew hemp and drafted the Declaration of Independence on hemp paper.[7] Even George Washington grew hemp.[8]

Marijuana became illegal in California in 1913 with the banning of preparations of hemp and "loco weed." Other states passed prohibitions: Utah (1915), Texas (1919), Louisiana (1924) and New York (1927).[9] Britain banned the recreational use of marijuana in 1924.[10]

Federal restrictions on marijuana started with the Marijuana Stamp Act of 1937, which made it illegal to possess marijuana without a special tax stamp (cost: $1.00). The Stamp Act effectively made the cultivation, use, and sale of marijuana illegal when the Treasury Department decided not to issue the applicable tax stamps. The Harrison Narcotic Act of 1951, known as the Boggs Act, increased mandatory drug sentences, and in 1956, President Eisenhower signed into law the Narcotic Control Act, which equated marijuana with heroin for sentencing purposes.[11]

From Intoxicant to Medicine[12]

Marijuana began to emerge as an intoxicant drug of choice in the United States in the 1960s. The first Gallup Poll on drug use, in 1969, found that only four percent of the adult population said they had tried marijuana.[13] (It is not clear if former President William Jefferson Clinton is included in that percentage.[14]) In just four years, that percentage tripled to 12 percent, and doubled again four years later.[15]

The same time that marijuana's use as an intoxicant spread, there was renewed interest in its medical applications. In 2005, the U.S. Supreme Court, in *Gonzales v. Raich*, had before it this question: "Whether the power vested in Congress by Article I, § 8, of the Constitution '[t]o make all Laws which shall be necessary and proper for carrying into Execution' its authority to 'regulate Commerce with foreign Nations, and among the several States' includes the power to prohibit the local cultivation and use of marijuana in compliance with California law."[16] The Court answered in the affirmative, and people in California, among the nine states at the time with compassionate use laws allowing the cultivation, use, and possession of marijuana for medical purposes, were subject to federal prosecution.[17]

There are many claimed medical uses for marijuana. A table from the State of Oregon's Medical Marijuana Program, as of April 1, 2012, lists conditions and the number of patients registered for each one (a patient may have more than one condition; total patients 55,807):

Agitation related to Alzheimer's disease	61
Cachexia	1,097
Cancer	2,056
Glaucoma	832
HIV+/AIDS	731
Nausea	7,856
Severe Pain	52,597
Seizures (including, but not limited to, epilepsy)	1,354
Persistent muscle spasms, including, but not limited to, those caused by multiple sclerosis[18]	14,671

Perhaps the most dramatic recent endorsement of marijuana's palliative powers has come from New York Trial Court Judge Gustin L. Reichbach, whose personal commentary "A Judge's Plea for Pot," was published in *The New York Times* on May 16, 2012.[19] The article describes how following a diagnosis of Stage 3 pancreatic cancer three and a half years earlier, he turned to marijuana for relief when nothing else helped: "Inhaled marijuana is the only medicine that gives me some relief from nausea, stimulates my appetite, and makes it easier to fall asleep.…I find a few puffs of marijuana before dinner gives me ammunition in the battle to eat. A few more puffs at bedtime permits desperately needed sleep." As Judge Reichbach saw it: "This is not a law-and-order issue; it is a medical and a human rights issue."

A debate about judicial ethics and possible sanctions followed this disclosure by Justice Reichbach, but Professor Stephen Gillers of New York University School of Law, an ethics expert, stepped right up: "He did not need to do it for himself. As a judge, he was uniquely positioned to give voice to the suffering of others whose pleas would not get the same attention….I can't imagine that anyone would be heartless and cruel enough to seek to sanction Reichbach for wishing to mitigate unimaginable pain."[20]

The federal government officially disagrees with the opinions of many that marijuana has numerous useful medical uses. In July 2011, the U.S. Drug Enforcement Agency denied a 2002 petition to reclassify marijuana to enable its use for medical purposes, holding that marijuana has "no accepted medical use" and should remain illegal under federal law.[21]

Marijuana as a Schedule 1 Drug

Lest you forget, it is still a federal crime to cultivate, possess, or use marijuana.[22] This causes all kinds of problems at the state and local level. For example, military personnel who live in states where it is legal and are prescribed marijuana for medical conditions are still subject to prosecution under the Uniform Code of Military Justice.[23] The operator of a perfectly legal medical marijuana dispensary in a city that allows such use, in a state that expressly permits the use, may nonetheless be in breach of a lease provision prohibiting illegal activity on the premises, which may, in turn, subject the landlord to foreclosure by a lender.[24]

The problems for real estate owners and landlords are real. A Whitefish, Montana landlord who rented to growers, in a state where it is legal to grow medical marijuana, was arrested and prosecuted by the U.S. Department of Justice. He received a sentence, after pleading guilty, of year and a day in May 2012.[25] The two growers received the same sentence.

College students often cannot use prescribed medical marijuana on campus in states where it is legal as a matter of state law because their schools fear losing their Title IV federal financial aid[26] if they violate the Safe and Drug-Free Schools and Communities Act[27] and the Drug Free Workplace Act[28] by allowing it. The University of Maine receives over $60 million under the program. There, an Afghanistan war veteran who has been prescribed marijuana for several debilitating conditions is not permitted to treat himself on campus.[29]

In October 2009, Attorney General Holder announced the Obama Administration's exceedingly mellow policy on medical marijuana: the Department of Justice (DOJ) would simply stop enforcing the federal marijuana ban against persons who comply with state medical marijuana laws.[30] Professor Robert A. Mikos of Vanderbilt Law School published an article in 2011 assessing the DOJ's new approach.[31] He notes the significance of the medical marijuana issue in both criminal law and federalism circles, and provides the first in-depth analysis of the changes wrought by the DOJ's new Non-Enforcement Policy (NEP). He suggests "that early enthusiasm for the NEP is misguided; and that on close inspection, the NEP represents at most a very modest change in federal policy."[32] First, he says:

> The NEP won't necessarily stop federal agents from pursuing criminal prosecutions of marijuana dispensaries. In a twist of irony, the non-enforcement policy itself is not enforceable. It doesn't create any legal rights a court could invoke to dismiss a criminal case. And the DOJ itself will have a difficult time ensuring that federal prosecutors comply with the agency's stated policy. Second, even assuming the NEP would block criminal prosecutions, federal law could still obstruct state medical marijuana programs by imposing—or enabling others to impose—a wide range of civil and private sanctions on medical marijuana users and their suppliers. The problem is the NEP doesn't repeal the federal ban on marijuana.[33]

Case in point: on March 14, 2011, federal agents with guns drawn raided at least ten medical marijuana operations in Montana, putting workers on the ground and handcuffing them. The officers had warrants under seal.[34] In California especially, the DOJ continues to vigorously enforce federal drug laws against marijuana growers and dispensaries as the U.S. Attorney for the Central District of California described in a press release earlier this year.[35] Marijuana remains illegal under federal law, and the possession, cultivation, or distribution of the drug triggers a host of civil sanctions not addressed by the NEP. For example, the Department of Housing and Urban Development can deny federal housing subsidies to medical marijuana users,[36] and Professor Mikos even speculates that pharmaceutical companies could potentially bring civil Racketeer Influenced and Corrupt Organizations Act actions against marijuana dispensaries.

It appears that the Obama administration has reversed course or is at least backpedalling on the NEP. Guidance from the Department of Justice that:

> Persons who are in the business of cultivating, selling or distributing marijuana, and those who knowingly facilitate such activities, are in violation of the Controlled Substances Act, regardless of state law. Consistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution. State laws or local ordinances are not a defense to civil or criminal enforcement of federal law with respect to such conduct, including enforcement of the CSA. Those who engage in transactions involving the proceeds of such activity may also be in violation of federal money laundering statutes and other federal financial laws."[37]

The federal ban arguably preempts states from shielding marijuana users and dispensaries from sanctions imposed by private parties. For example, what about the potential liability of employers under state law for discriminating against employees who use marijuana for medical purposes? The widely-reported case of a Wal-Mart employee, dying of cancer and taking prescribed marijuana, illustrates the problem: Wal-Mart fired the man for violating the company's zero-tolerance drug policy, and the court dismissed his claim against the employer.[38] Public Act 12-55 attempts to protect employees by providing:

> No employer may refuse to hire a person or may discharge, penalize or threaten an employee solely on the basis of such person's or employee's status as a qualifying patient or primary caregiver under Sections 1 to 15, inclusive, of this act. Nothing in this subdivision shall restrict an employer's ability to prohibit the use of intoxicating substances during work hours or restrict an employer's ability to discipline an employee for being under the influence of intoxicating substances during work hours.[39]

This is a legal mare's nest and will continue to be. Be mindful of the federal overlay and the fact that the NEP leaves the private sector, and state and local governments, open to criminal and civil liability, regardless of what the state and local law may provide.

The Implementation Problem

Connecticut's medical marijuana legislation is all new law with no reference to the state's planning and zoning laws. Growing, distributing, prescribing, dispensing, possessing, and using marijuana all have an admixture of business regulation and land use regulation. Sometimes, as with adult entertainment regulation which may have business licensing and zoning controls, it is hard to draw the line. Enter the world of the known

unknowns and hold on tight to your pack of Zig-Zag® papers as you may be sucked into the nether realm of the unknown unknowns.

Take cultivation, for example. The new law requires an indoor, secure facility. Those facilities will be licensed by the state. But, do local governments have the authority to regulate the size, location, setback, and so on? Even before the law was enacted, Connecticut planners on their popular listserv were abuzz. One planner posted this inquiry which received several responses: "Now that medical marijuana is rolling right along, have any communities discussed limiting dispensaries that only distribute this item?" Torrington amended its zoning regulations to limit medical marijuana dispensaries to business and industrial zones.[40]

As Public Act 12-55 was being enacted, towns started to hold meetings to talk about zoning out marijuana use. Southington leaders met at the end of May to discuss how they were going to regulate medical marijuana locally. Said one Planning & Zoning Commissioner member: "'That [where it will be grown] is our biggest concern, is around where production will happen and the controls around production. This is something we really have to tightly control, even more so than current controlled drugs.'"[41]

It will take some time, many months and perhaps years, and amendments to both the medical marijuana law and the state zoning enabling law, before the disconnect between state and local government on land use of medical marijuana is resolved. In the meantime, local governments addressing the issues need to have in mind several basic requirements of defensible regulation that comports with the new state law.

An important decision was handed down by the 4th District Court of Appeal in California on July 3rd striking down on preemption grounds Los Angeles County's attempted ban on medical marijuana dispensaries as per se nuisances:[42]

> …the Legislature in the [medical marijuana law] contemplated the lawful operation of medical marijuana dispensaries in the circumstances specified…, namely, using property collectively or cooperatively to grow, store, and distribute medical marijuana, and expressly immunized that activity from nuisance abatement. County's per se ban on medical marijuana dispensaries prohibits what the Legislature authorized….The contradiction is direct, patent, obvious, and palpable: County's total, per se nuisance ban against medical marijuana dispensaries directly contradicts the Legislature's intent to shield collective or cooperative activity from nuisance abatement "solely on the basis" that it involves distribution of medical marijuana authorized by [the law]. Accordingly, County's ban is preempted.

Put the preemption issue in the "known unknowns" column for now.

What Local Governments Should Consider

Here are some preliminary suggestions for municipalities that are beginning to regulate medical marijuana uses.

Adopt a Strong Purpose Section and Detailed Findings. Local planners shouldn't scrimp here: lay out what the state law requires and allows, and describe what you wish to accomplish with the regulations. The City of Clare, Michigan (reciting the studies and experience elsewhere) adopted some compelling findings about the blighting and secondary effects of marijuana operations, including:

> The experience in the State of California, a state that approved the medical use of marijuana more than a decade ago, is that concentrations of marijuana distribution activity lead to the following significant and serious secondary effects:
>
> > California law enforcement reported in 2009 (White Paper), that nonresidents in pursuit of marijuana, and out of area criminals in search of prey, are commonly encountered just outside marijuana dispensaries, as well as drug-related offenses in the vicinity—like resales of products just obtained inside—since these marijuana centers regularly attract marijuana growers, drug users, and drug traffickers. Sharing just purchased marijuana outside dispensaries also regularly takes place. There have been increased incidents of crime, including murder and armed robbery.[43]

Secondary effects are the results of certain uses. The effects with medical marijuana dispensaries, as identified by the California Police Chiefs Association, include: attacks on and murders of dispensary operators to get the large amounts of cash kept onsite, drug dealing, sales to minors, loitering, traffic congestion, increased noise, robberies of customers, firearms on the properties and use by perpetrators, unhealthful mold from large indoor grow-operations, money-laundering, and the list goes on.[44] Local governments probably do not have the time or money to replicate the California study or any other, but you can cite it and, by doing so, might just save the day if your regulations are challenged.

Importantly, Connecticut's unique, top-down, highly-restrictive approach with Department of Consumer Protection oversight may avoid most if not all of the secondary effects. Local governments should not necessarily expect that the problems experienced in other states will be found here… call this a "known unknown."

The issue of secondary effects remains unsettled. In July 2012 the *Journal of Studies on Alcohol and Drugs* published an article, "Exploring the Ecological Association Between Crime and Medical Marijuana Dispensaries," reporting on an analysis of 95 census tracts in Sacramento, California on the relationship between medical marijuana dispensaries and the incidence of violent crimes and property crimes.[45] Guess what?—the authors found no secondary effects:

> These findings run contrary to public perceptions (California Police Chief's Association, 2009). The cross-sectional results suggest that dispensaries are not associated with crime rates; however, current media and policy efforts have focused their attention on the place-based regulation of these dispensaries to protect the public against crime (California Police Chief's Association, 2009; City of Los Angeles, 2010; Lopez, 2010). Based on the limited evidence presented by this study, it is unclear if place-based policies will be effective.[46]

Define Everything. This is new territory, so local governments should err on the side of more definitions. Spend the time needed to draw hard lines where you can. The City Council in Peoria City, Arizona spent an hour and a half just discussing the definition of what it meant to be out in public when

it came to smoking marijuana.[47] The definitions in the new state law should be followed verbatim or incorporated by reference. There will be enough confusion and conflict during implementation without inconsistent definitions.

None of the states, including ours, prohibit local separation requirements between dispensaries and what are considered sensitive uses. A town adopting separation requirements needs to define what counts as a school, a park, a playground, and a place where children gather.

Identify Locations. State where marijuana uses (grow operations, dispensaries) can and cannot be located, as Torrington has done. Generally, distancing or separation requirements for marijuana cultivation and dispensing seem to mimic those imposed on adult entertainment uses. Enabling legislation in some states requires such restrictions, and these requirements can be helpful in avoiding the concentration of uses and adverse impacts on sensitive areas. Lists and a map of available sites can prevent misunderstandings. This is an opportunity to work directly with the Department of Consumer Protection, which is tasked with an open and participatory process under the statute.

Cap the Number of Facilities. In Connecticut, this will be a state responsibility, but elsewhere, local governments have been left with the job. Boulder, Colorado has more marijuana dispensaries than Starbucks coffeehouses and liquor stores.[48] Colorado, by the way, also has the first marijuana critic, William Breathes (a pseudonym, maybe from the sixth official studio album by Phish, *Billy Breathes*), who reviews the state's medical marijuana dispensary "products" for Denver's alt-weekly newspaper *Westword*, in the same fashion as a food critic.[49] Los Angeles caps the number of allowed marijuana dispensaries at 70, and allocates these for each of its 35 planning areas. Service levels based on the number of residents range from one per 35,000 residents (San Francisco) to 57,000 (Los Angeles) to 105,000 (Oakland). The Department of Consumer Protection will be looking hard at the just how many dispensaries are needed in what locations to serve the public need. There may be some risk of overreaction by local governments in attempting to entirely prohibit medical uses, just like "dry" and "damp" towns.[50] If that happens, it is possible that the General Assembly will use the state's inherent authority under the police power over land use to take back some of that local authority, as it has done, by way of example, with double-wide manufactured housing,[51] group homes for developmentally-disabled adults,[52] and affordable housing.[53]

Other Aspects to Consider. Will there be a requirement for the operator to provide security to prevent crime, beyond what the state may require? What about signage, hours of operation, size, location relative to other sensitive uses, and screening of the growing area? Will there be a limit on the number of plants?[54]

Conclusion

Without question, cannabis has proven palliative effects, and can extend the lifespan and improve the quality of life for many patients. The challenge for state and local lawyers and planners, and for those who grow, prescribe, dispense, possess, and use the drug, to work together to find ways to meet the needs of the patients, while avoiding a blighting impact on communities and the promotion of use as a recreational intoxicant. That safe passage, that middle ground between accessibility and restraint, will be hard to find even with our truly excellent new law. The successes and failures in other states and in so many municipalities offer us some guideposts to help us through the known unknowns and even the unknown unknowns as they emerge, as they most certainly will. **CL**

Notes

Note: Some parts of this article appeared earlier in "Reefer Madness: Municipal Regulation of Medical Marijuana," *Municipal Lawyer*, International Municipal Lawyers Association, May/June 2011, and in "Ganga in the Land of Steady Habits," *Connecticut Law Tribune*, April 9, 2012, and are used with permission.

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46. At 529.
47. Sonu Munshi, Peoria City Council approves medical-marijuana regulations, *The Arizona Republic*, Feb. 17, 2011.
48. *See* http://www.westword.com/authors/william-breathes/; http://hypervocal.com/news/2011/video-denvers-professional-pot-critic-william-breathes-has-a-job-you-may-want/
49. *Id.*
50. "'Damp' Towns," Office of Legislative Research Report 2009-R-0101 http://www.cga.ct.gov/2009/rpt/2009-R-0101.htm ("Dry towns are municipalities wherein the local government forbids the sale of any alcoholic liquor… 'Damp' towns, though not defined in state statute, are municipalities that allow some liquor to be sold within city limits.").
51. Conn. Gen. Stat. § 8-2 ("The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures…" However, the zoning commission "shall not impose conditions and requirements on manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards …").
52. Conn. Gen. Stat. § 8-3e (zoning regulations must treat a community residence or child-care residential facility housing six or less disabled persons and staff, in the same manner as a single family residence; however, if a community residence or child-care residential facility is not compliant with applicable state statutes and regulations concerning the operation of such a residence, the license can be revoked or funds withdrawn).
53. Conn. Gen. Stat. § 8-30g (mandating that each municipality should have a percentage of its housing qualify as "affordable housing").
54. The City of Los Angeles has a highly detailed ordinance, which may prompt your thinking on what to include—*see* Article 5.1, Medical Marijuana Collective, at http://tinyurl.com/2dvuvv (last visited May 09, 2011). The Mendocino County, California board of supervisors, threatened with a RICO action by federal officials, recently changed its well-regarded ordinance to reduce the number of plants that may be grown on a parcel from 99 to 25. "Federal Threats Change Mendocino County Medical Marijuana Regulation," North Coast, June 25, 2012. http://www.indybay.org/newsitems/2012/01/25/18705630.php